UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1941

September Term, 2014

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JONATHAN R. HARRINGTON

v.

STATE OF MARYLAND

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Kehoe,
Leahy,
Raker, Irma, S.
(Retired, Specially Assigned),
JJ.

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Opinion by Kehoe, J.

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Filed: June 16, 2016

Following a jury trial in the Circuit Court for Baltimore County, Jonathan R. Harrington, appellant, was convicted of the following charges: (1) driving while under the influence of alcohol, Md. Code (1977, 2012 Repl. Vol) § 21-902(a), of the Transportation Law Article ("TA"); (2) driving while impaired by alcohol, TA § 21-902(b); (3) failure to control vehicle speed on highway to avoid collision, TA § 21-801(b); (4) negligent driving, TA § 21-901.1(b); (5) reckless driving, TA § 21-901.1(a); and (6) violating a license restriction, TA § 16-113(h). The court sentenced Harrington to 23 months of imprisonment for driving while under the influence and concurrent sentences of 12 months for refusing to take a breathalyzer test and 30 days for violating a license restriction. Harrington presents us with five questions which we have reworded:

> 1. Did the trial court err by giving the "no adverse inference" jury instruction as to Harrington's decision not to testify?
>
> 2. Did the trial court abuse its discretion when it denied Harrington's request for a postponement?
>
> 3. Did the trial court err when it denied Harrington's motion to disqualify Trooper Hall as a witness?
>
> 4. Did the trial court err when it excluded the testimony of Joseph Brandt as hearsay?
>
> 5. Did the trial court impose illegal sentences for Harrington's refusal to take a breathalyzer test and the violation of Harrington's license restriction?

We conclude that the trial court erred in giving the instruction in question but that the error was harmless. We answer "no" to questions two through four but "yes" to the fifth. Therefore, we affirm in part and vacate in part the judgment of the circuit court.

## Background

At approximately 4:30 p.m. on November 20, 2012, Harrington was driving on the outer loop of I-695 northeast of Baltimore City when he careened into a vehicle stopped in traffic, damaging three automobiles and injuring five individuals. Upon arriving at the scene, Maryland State Police Trooper Christopher Hall encountered Harrington. After "detect[ing] a strong odor of alcohol coming from his breath . . . [and that Harrington's] eyes were red and glossy [sic,]" Trooper Hall asked Harrington if he had consumed alcohol, to which Harrington replied that he "had too much." Trooper Hall also concluded that Harrington appeared to be confused as to his location and observed that Harrington had an alcohol restriction on his driver's license. After Trooper Hall administered multiple field sobriety tests, all of which Harrington failed, he arrested Harrington for drinking and driving. Upon receiving his advice of rights-form DR-015 in accordance with TA § 16.205.1, Harrington refused administration of a breathalyzer test.

As a result of the accident and the investigation, Harrington was charged with: (1) driving while under the influence of alcohol; (2) driving while impaired by alcohol; (3) driving while under the influence of alcohol per se; (4) failure to avoid vehicle speed on highway to avoid collision; (5) negligent driving; (6) reckless driving; and (7) violating a license restriction. During the course of the two-day trial, the court dismissed the driving

while under the influence of alcohol per se count. A jury convicted Harrington of all six remaining counts, and the court sentenced Harrington as noted above.

## Analysis

### I. The "No Adverse Inference" Jury Instruction

Harrington asserts that the trial court erred in giving the jury the "no adverse inference" instruction regarding his decision not to testify over his counsel's objection. Immediately preceding jury instructions, the following colloquy occurred:

> [Defense Counsel]: Your Honor, the defense would only object to the instruction about [Harrington] not testifying, not being held against him and would request—
>
> The Court: You don't want me to tell the jury not to consider his refusal to testify?
>
> [Defense Counsel]: Yes, Your Honor.
>
> [Prosecutor]: Your Honor—
>
> The Court: Are you licensed in this State?
>
> [Defense Counsel]: I am, Your Honor. But I believe that telling the jury that [Harrington's] refusal to testify—
>
> The Court: First defense attorney in my entire career that has ever objected to that instruction.
>
> [Defense Counsel]: I have no doubt that is true, but we nevertheless, we object.
>
> [Prosecutor]: Your Honor, I'm going to do something completely out of course here but I believe that that absolutely needs to be an instruction to prevent this from possibly ending as a mistrial. That is the Defendant's constitutional right, Your Honor.

The Court: That's right. I'm giving that instruction.

[Defense Counsel]: All right.

The court later gave the following instruction—drawn nearly verbatim from Maryland Criminal Pattern Jury Instruction 3:17—to the jury:

> The Defendant has an absolute constitutional right not to testify. The fact that the Defendant did not testify must not be held against him. It must not be considered by you in any way or even discussed by you during your deliberations.

Neither counsel raised any objections to the instructions after they were given.

Harrington contends that the trial court erred in giving this instruction over Harrington's objection. In response, the State argues that the contention is not preserved for review because Harrington's counsel did not object to the instruction after it was given. We disagree.

Maryland Rule 4-325(e) requires parties to object to a jury instruction after the instruction is given. *See* Md. Rule 4-325(e) ("No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury[.]"). We recently explained the policy reasons for such a requirement:

> There are good reasons for requiring an objection at the conclusion of the instructions even though the party had previously made a request. If the omission is brought to the trial court's attention by an objection, the court is given an opportunity to amend or correct its charge. Moreover, a party

> initially requesting a particular instruction may be entirely satisfied with the instructions as actually given.

*Choate v. State*, 214 Md. App 118, 130 (2013) (citation omitted). Harrington's trial counsel did not object *after* the instructions were given and, if Rule 4-325(e) applies to this case, the contention of error is not preserved.

To avoid this result, Harrington—quoting *Sims v. State*, 319 Md. 540, 549 (1990)—argues that the issue was preserved because trial counsel "'made it crystal clear that there [was] as on-going objection'" to the instruction. The difficulty with this argument is that trial counsel did not suggest in any way, much less make it crystal-clear, that his objection to the instruction was a continuing one. Indeed, counsel's response of "[a]ll right" to the court's ruling that it would give the instruction is inconsistent with the notion of an ongoing objection. However, *Sims* also alludes to the principle that, when "restating the objection after the instructions would obviously be a futile or useless act, [appellate courts] will excuse the absence of literal compliance with the Rule." *Id.* (citing *Gore v. State*, 309 Md. 203, 208-09 (1987) and *Bennett v. State*, 230 Md. 562, 568 (1962)). In light of the emphatic and categorical nature of the trial court's remarks when it overruled Harrington's initial objection, trial counsel could reasonably have concluded

that a renewed objection would be pointless. We will address Harrington's contention on its merits.[1]

As to the merits, the State concedes, as it must, that the trial court erred when it gave the instruction over Harrington's objection. *See Hardaway v. State*, 317 Md. 160, 169 (1989) ("'In our adversary system, it is enough for judges to judge. The determination of [whether the right not to testify instruction] may be useful to the defense can properly and effectively be made only by an advocate.'") (quoting *Dennis v. United States*, 384 U.S. 855, 874-75 (1966)).

We now turn to the question of the appropriate appellate remedy. The State argues that the court's error was harmless; Harrington asserts that reversal is required without consideration of prejudice.

Harrington relies on *Hardaway*, where the Court of Appeals reversed the conviction without discussing whether the instruction prejudiced the defendant. Harrington posits that *Hardaway* stands for the proposition that a trial court's issuance of a failure to testify instruction over a defendant's objection is grounds for reversal regardless of actual prejudice to the defendant. He does not elaborate on this contention but implies that the court's instruction amounted to a structural error. *See Martin v. State*, 165 Md. App. 189, 200 n.4 (2005) ("Structural error affects the 'framework within

[1]Our conclusion moots Harrington's contention that we should consider on direct appeal whether he should be awarded a new trial on the basis of inadequate trial counsel.

which the trial proceeds[,]' and is not subject to harmless error scrutiny.'") (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). We disagree.

First, we do not equate the fact that the *Hardaway* Court did not discuss harmless error with an affirmative holding that the error is structural. There is no indication in the opinion that the State raised harmless error nor, for that matter, was there any discussion of the evidence adduced at trial against Hardaway.

Second, the conclusion that the error was structural runs counter to the general principle that trial errors are not a basis for appellate relief unless there is prejudicial effect. *See, e.g., Whitney v. State*, 158 Md. App. 519, 537 (2004). As a general rule, defective jury instructions, even constitutionally defective jury instructions, do not constitute structural error. *See Clemons v. Mississippi*, 494 U.S. 738, 752-754 (1990); *Carella v. California*, 491 U.S. 263, 266 (1989); *Pope v. Illinois*, 481 U.S. 497, 501-504 (1987).

In our view, the error in question should not be treated as structural. In *Alston v. State*, 177 Md. App. 1 (2007) *aff'd*, 414 Md. 92 (2010), we discussed the distinction between structural and trial error:

> A structural defect or error is one that affects the framework within which the trial proceeds, rather than simply an error in the trial process itself . . . and transcends the criminal process. Trial defects that the Supreme Court has held to be structural error include: deprivation of the rights to counsel at trial, to an impartial judge, to self-representation, and to a public trial, as

> well as unlawful exclusion of members of the defendant's race from a grand jury.

*Id.* at 13 (brackets, quotation marks and citations omitted) (citing *Arizona v. Fulminante*, 499 U.S. 279, 309-11 (1991)).

The court's instruction was an absolutely correct statement of the law and is routinely given to juries in cases in which the accused does not testify. The trial court certainly erred in giving the instruction but only because Harrington objected to it. In our view, this error is not nearly of a sufficient magnitude to "transcend the criminal process" or to "affect the framework of the trial." We hold that the trial court's decision to give the instruction over Harrington's objection was not structural error.[2] We must reverse the trial court's judgments unless we conclude beyond a reasonable doubt that the instruction had no effect on the jury's verdict. *See Dorsey v. State*, 276 Md. 639, 658 (1979). This brings us to the State's harmless error argument.

The evidence against Harrington was extremely strong. In addition to the testimony of Trooper Hall, which we have previously summarized, the driver of one of the other automobiles involved in the accident testified that Harrington's vehicle caused the collision and identified Harrington as the driver. None of this evidence was

[2]This conclusion is in accord with the majority of the courts that have considered the matter. *See People v. Anderson*, 505 N.E. 2d 1303, 1307 (Ill. Ct. App. 1987); *State v. Rhodes*, 380 A.2d 1023, 1027 (Me. 1977); *State v. Bryant*, 195 S.E. 2d 509, 513 (N.C. 1973); *and State v. Darris*, 648 N.W. 2d 232, 240 (Minn. 2002).

challenged in any meaningful way on cross-examination and Harrington presented no evidence, other than introducing a copy of the Trooper Hall's accident report. While a jury could conclude that there were minor discrepancies between the report and Hall's testimony, none of the inconsistencies undermined the strong evidence that there had been a serious accident, that Harrington had caused the accident, and that Harrington had been inebriated at the time of the accident. We conclude beyond a reasonable doubt that the trial court's instructional error could not have affected the jury's verdict.

## II. The Request for a Postponement and the Motion to Disqualify Trooper Hall

Harrington asserts that the administrative judge of the Circuit Court for Baltimore County abused his discretion when he denied Harrington's request for a postponement on the morning of the first day of trial. He also contends that the trial court abused its discretion when it denied his motion to disqualify Trooper Hall as a witness later that morning. We will address these contentions together because they related.

Both motions arose out of alleged discovery violations on the State's part. The State provided various documents to defense counsel some months prior to trial, including a police report of the accident. The State did not disclose a copy of Trooper Hall's accident report. The prosecutor received a copy of the accident report on the morning of the first day of trial and promptly disclosed the report to defense counsel. At the pre-trial conference, Harrington indicated to the trial judge that he intended to file a

motion to disqualify Trooper Hall as a witness. The trial judge indicated that he was not inclined to grant the motion.[3]

On the morning of trial, Harrington's counsel requested a postponement. Counsel stated to the administrative judge that he was requesting a postponement "because Judge Cavanaugh mentioned that he would be reluctant to grant a couple of motions." Counsel did not specify what the motions were nor did he provide any other grounds for a postponement. The administrative judge denied the motion. On this record, we cannot say that the administrative judge abused his discretion.[4]

After his request for a postponement was denied by the administrative judge, Harrington presented to the trial court an oral motion *in limine* to disqualify Trooper Hall as a witness. He based this motion on the State's failure to disclose the accident report until the morning of trial. Defense counsel asserted that the untimely disclosure of the accident report left him unprepared to cross-examine Trooper Hall as to the field sobriety tests administered by Hall at the scene of the accident. (Defense counsel's contention

[3]The record does not include a transcript of the pre-trial conference hearing so this part of our narrative is based on comments made by counsel to the administrative judge.

[4]To this Court, Harrington asserts that the State's failure to disclose Trooper Hall's accident report and the identity of the State's testifying witnesses until the morning of trial presented good cause for a postponement and that he was prejudiced by the court's failure to grant the request. But these arguments were not presented to the administrative judge and we will not consider them for the first time on appeal. *See* Md. Rule 8-131(a); *Conyers v. State*, 367 Md. 571, 594-95 (2002).

overlooked the fact that the accident report contained no information about the field sobriety tests or their results.) Defense counsel also conceded that he had not previously filed a motion to disqualify Trooper Hall. For her part, the prosecutor stated that, as regards the field sobriety test, the accident report was cumulative because all of the information contained in it was also contained in Trooper Hall's statement of probable cause and the police report, which had been disclosed in discovery. The trial court denied the motion. Harrington asserts that the court abused its discretion in doing so.

Maryland Rule 4-263 governs discovery in criminal cases. One of its primary purposes is "to assist defendants in preparing their defense and to protect them from unfair surprise." *Williams v. State*, 364 Md. 160, 172 (2001). "To implement the objectives of the Rule, it is within the discretion of the trial court to impose sanctions if the Rule is violated." *Thomas v. State*, 397 Md. 557, 570 (2007). In deciding how to remedy a criminal discovery violation, courts weigh two overarching, and sometimes overlapping, considerations: fairness to the parties and judicial efficiency. The leading Maryland case on this topic is *Taliaferro v. State*, 295 Md. 376, 390-91 (1983), which identified five considerations which should guide a trial court in fashioning a discovery sanction:

> [1] whether the disclosure violation was technical or substantial, [2] the timing of the ultimate disclosure, [3] the reason, if any, for the violation, [4] the degree of prejudice to the parties respectively offering and opposing the evidence, [5] whether any resulting prejudice might be cured by a

> postponement and, if so, the overall desirability of a continuance. Frequently these factors overlap. They do not lend themselves to a compartmental analysis.

When we apply these factors to the present case we conclude: (1) the discovery violation was not substantial because the information in it was largely cumulative to information previously disclosed; (2) the accident report was disclosed on the day of trial; (3) Harrington does not suggest that the violation was in bad faith and it appears to us to have been inadvertent; (4) there was no prejudice to Harrington because the information regarding the field sobriety tests was set out in the statement of probable cause, which had been disclosed to defense counsel months before trial and the accident report did not refer to the field sobriety tests; and (5) while any hypothetical prejudice would have been cured by a postponement, there was no prejudice to cure. We conclude that the trial court did not abuse its discretion in disqualifying Hall as a witness because of the discovery violation.

## III. The Exclusion of Joseph Brandt's Testimony

Harrington's fourth assignment of error relates to the trial court's ruling excluding the testimony of Joseph Brandt as hearsay. Brandt—whose status was never made clear in the record—was present at prior district court proceedings and would have testified, Harrington contends that Brandt overheard Trooper Hall inform defense counsel that, when Harrington requested an attorney prior to submitting to a breathalyzer test, Trooper

Hall responded that "nobody would answer him at that time of day [that is, about 6:48 pm]." The prosecutor objected on the grounds that the testimony would be hearsay and the court sustained the objection. Harrington argues that this statement was admissible under an exception to the general rule against hearsay because it was not being offered for the truth of the matter asserted but rather for impeachment purposes. The difficulty with Harrington's argument is that the proffered testimony was not admissible as impeachment evidence for another reason.

Maryland Rule 5-616 provides in pertinent part that "[t]he credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at . . . : [p]roving under Rule 5-613 that the witness has made statements that are inconsistent with the witness's present testimony. . . ."

Md. Rule 5-613 states:

> **Prior statements of witnesses.**
>
> (a) **Examining witness concerning prior statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that at the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, *or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness* and (2) the witness is given an opportunity to explain or deny it.
>
> (b) **Extrinsic evidence of prior inconsistent statement of witness**. Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1)

> until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) *unless the statement concerns a non-collateral matter*.

(Italicized emphasis added.)

The State asserts that Brandt's testimony about what Trooper Hall told defense counsel at the prior proceeding would have been inadmissible for two reasons. First, the State contends that Harrington did not disclose the contents of the allegedly inconsistent statement to Hall when he was testifying as is required by Md. Rule 5-613(a)(1). Second, it argues that Brandt's proffered testimony constituted extrinsic evidence and, as such, was admissible to impeach Hall only if it concerned a "non-collateral matter." The State is unquestionably correct as to its first contention and we need not consider the second.

We start with the relevant portion of Hall's cross-examination:

> [Defense Counsel]: And you and I had an opportunity to discuss briefly [Harrington's] refusal [to consent to a blood alcohol test] yesterday, is that right?
>
> [Hall]: Yes, sir.
>
> [Defense Counsel]: And at the time I brought up concern that I had about [Harrington's]—[Harrington] disputed the fact that he refused the test, do you remember?
>
> [Hall]: You are saying that your defendant said he didn't want to take the test? Say that again?
>
> [Defense Counsel]: I'm saying you and I discussed this matter.
>
> [Hall]: When was this?

[Defense Counsel]: We discussed it March 20th, 2015,[5] you recall that?

[Hall]: That was like a year ago, sir.

[Defense Counsel]: You don't remember?

[Hall]: I'm not saying we didn't say that. I'm saying I don't remember it.

[Defense Counsel]: Well, do you remember our conversation at all?

[Hall]: Honestly, no.

[Defense Counsel]: No. Do you remember meeting me ever before?

[Hall]: I have seen you before but I don't remember that conversation. I'm sorry.

[Defense Counsel]: All right . . . .

In his brief to this Court, Harrington asserts that Brandt would testify that, at a prior court appearance, he witnessed Hall acknowledging to defense counsel "that when Harrington requested an attorney prior to submitting to a breathalyzer, Hall told Harrington that 'nobody would answer him at that time of day.'" This information was quite clearly not disclosed to Hall during when he was on the witness stand and Hall was not given an opportunity to deny, explain or rebut the alleged statement. The trial court did not err in declining to admit Brandt's testimony. *See Brooks v. State*, 439 Md. 698, 717 (2014) (As a predicate to the admission of a prior inconsistent statement, "[t]he witness to be impeached must be given an opportunity to explain or deny the allegedly

[5]The trial took place on September 11–12, 2014. The transcript is obviously in error.

inconsistent statement. Rule 5-613(a)(2), (b)(1)" and the witness "must have 'failed to admit having made the statement.'") (citing Rule 5-613(b)(1)).

## IV. Two Sentencing Errors

Harrington's final assignment of error relates to sentencing. He asserts that some of the trial court's sentences were illegal and that the docket entries and commitment record do not accurately reflect the court's sentences. The State concedes that he is correct and we agree. The chart on the next page illustrates the problems:

| Charge | Disposition | Sentence according to the docket entries and the commitment record | Actual sentence imposed by the trial court |
|---|---|---|---|
| (1) TA § 21-902(a): Driving under the influence of alcohol | Guilty | 23 months | 23 months |
| (2) TA § 21-902(b): Driving while impaired | Guilty | 12 months | ----- |
| (3) TA § 21-902(c): Driving under the influence of alcohol per se | Dismissed by trial court | | |
| (4) TA § 21-801(b): Failure to control vehicle speed to avoid accident | Guilty | 30 days | ----- |
| (5) TA § 21-901.1(b): Negligent driving | Guilty | ---- | ---- |
| (6) TA § 21-901.1(a): Reckless driving | Guilty | ---- | ---- |
| (7) TA § 16-113(h): Violating a license restriction | Guilty | ---- | 30 days |
| Not Charged: | | | |
| (8) TA § 16-113(j): Refusal to submit to a breathalyzer test | Not submitted to the jury | ---- | 12 months |

The sentence of 30 days' incarceration for violating a license restriction (TA § 16-113(h)) was illegal. TA § 16-113(h) provides: "An individual may not drive a vehicle in any manner that violates any restriction imposed by the Administration in a restricted license issued to the individual." TA § 27-101sets out the penalties for violations of the various provisions of the Transportation Article. TA § 27-101(b) provide that the default penalty is a fine of up to $500. Section 27-101 sets out a number of exceptions to the general rule but there is none for a violation of § 16-113(h).[6]

[6]Section 27-101(c)(10) empowers courts to incarcerate those who violate TA (continued...)

The court's sentence of 12 months' incarceration for refusing to submit to a breathalyzer test (TA § 16-113(j)) was illegal because he was not charged with that crime.

Additionally, the docket entries and the commitment record must be corrected to reflect the fact that the trial court did not imposes sentences for Harrington's convictions of driving while impaired (TA § 21-902(b)) or for failure to control vehicle speed to avoid accident (TA § 21-801(b)).

In conclusion, the sentences for refusing the breathalyzer test and violating a license restriction must be vacated and the case remanded to the circuit court for resentencing on the violation of TA § 16-113(h) as well as correction of the docket and commitment record in a manner consistent with this opinion.

**THE SENTENCES FOR VIOLATING TRANSPORTATION ARTICLE §§ 16-113 (h) AND (j) ARE VACATED. THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY ARE OTHERWISE AFFIRMED. THE CASE IS REMANDED TO THAT COURT FOR RESENTENCING ON THE VIOLATION OF TA § 16-113(h) AND CORRECTION OF THE DOCKET AND COMMITMENT CONSISTENT WITH THIS OPINION.**

**COSTS TO BE ALLOCATED: 3/4 TO APPELLANT, 1/4 TO BALTIMORE COUNTY.**

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[6](...continued)
§ 16-113(j), which prohibits the operation of a motor vehicle in violation of an alcohol-related license restriction. But Harrington was not charged with violating TA § 16-113(j). He was charged with, and convicted of, violating TA § 16-113(h) and the punishment for that crime is limited to a fine of $500.